be a creditor of the firm, but no case has been cited to show that, being a partner, he is prevented from being the agent of a creditor of the firm, and as such agent receiving a payment from the firm of which he is a partner and thus discharging the firm. The plaintiff put Seng Kwang into such a position when he gave the Power of Attorney and must remain bound by it.

I hold therefore that the payments in question are a good discharge and vary the Registrar's Certificate in accordance with the terms of the Summons. Costs of the argument on certificate to be defendants in any event.

Registrar's Certificate Varied.

[ORIGINAL CIVIL JURISDICTION]

HORNE, J.

March 22, 1939.

IN THE MATTER OF THE ESTATE OF EUSOFF MOHAMED SALLEH ANGULLIA, DECEASED.

AHMAD MOHAMED SALLEH ANGULLIA & 2 OTHERS.....Plaintiffs

vs.

RAHIMABOO BINTE MOHAMED SALLEH ANGULLIA & ANOTHER.....Defendants

[SINGAPORE PROBATE No. 252 of 1938 & Suit No. 408 of 1938]

Probate of Will—Testamentary capacity—Unsoundness of Mind and Undue Influence—Onus of Proof—Costs of probate action.

Where a will is impeached on the ground of unsoundness of mind, the Court must be satisfied on a review of the whole evidence that the testator was of sound mind, memory, and understanding at the time of its execution; but there is a strong presumption in favour of any will which in terms is not unreasonable and shows no sign of mental defeciency. *Estate of Bohrmann* (1938) A.E.R. 271, and *Smith* v. *Tebbitt*, 1 P. & D. 398, considered.

A testator had suffered from attacks of insanity in the past, and had on 4 occasions, namely, in 1910, 1918, 1924 & 1934, been certified as insane and detained in a mental hospital for short periods. He had long lucid intervals between the attacks and on the 4th June 1938 he executed a Will and a codicil giving most of his estate to charity. The will was attested by the testator's solicitor and his doctor, both of whom deposed to the fact that the testator, although physically weak and mentally dull at the time, appeared to be of sound mind, memory and understanding. The testator died on the 7th June 1938 from a diabetic attack.

Held, on the evidence as a whole, that the will and codicil had been made in a lucid interval, and should be pronounced for.

Costs awarded out of the estate to defendants unsuccessfully opposing probate on the ground of unsoundness of mind, where there is a reasonable case for inquiry.

Rule in *Mitchell* v. *Gard*, (1863) 3 Sw. & Tr. 275, applied.

WITNESS ACTION.

On the 27th July 1938 the Plaintiffs filed a Petition for Probate of the Will and Codcil of Eusoof Mohamed Salleh Angullia deceased as the executors named therein. The Petition was opposed by the 1st Defendant who had filed a caveat on the 11th July 1938, and by the 2nd Defendant who filed a caveat on the 2nd September 1938. By an Order dated the 16th September 1938 it was ordered that the matter proceed as an action with pleadings.

The 1st Defendant delivered a defence alleging (a) that the testator was not of sound mind memory and understanding at the time of the execution of the Will and Codicil; and (b) that the execution of the Will and Codicil was procured by the undue influence of the 1st Plaintiff. The 2nd Defendant did not file any defence or take part in the trial.

Koek & Garden for the Plaintiffs.

Burke for the 1st Defendant.

Sammy for the 2nd Defendant, appeared but took no part in the proceedings.

Worley, Solicitor-General, for the Attorney-General who had been cited as representing the charitable interests, also appeared but took no part in the proceedings.

At the conclusion of the evidence the Judge ruled that there was no evidence of undue influence at the time of the execution of the Will and Codicil, and the argument was thereafter confined to the issue of testamentary capacity.

Cur. Ad. Vult.

HORNE, J.—Ahmad M. S. Angullia, his two sons, the Executors, the plaintiffs, propound a will made on the 4th day of June 1938 by Eusoff Mohamed Salleh Angullia (hereinafter referred to as Eusoff) who died on the 7th of June 1938. Eusoff is a younger brother of Ahmad.

The first or active defendant is Rahimaboo the sister of Eusoff and Ahmad. There is a second defendant Rahimaboo, who from 1927 to 27th March 1938 was the wife of the testator. She is a defendant on the record, having entered an appearance but has not formally pleaded.

The defendant Rahimaboo by the substance of the case alleges that the testator was of unsound mind when he made his will; that he had been of unsound mind for many years prior to his death: that he was subject to fits of violence and delusions; that he had been certified as insane and had been under treatment on four occasions, viz: in 1910, in 1918, in 1924 and 1934; that in 1918 and 1934 the diagnosis had been "imbecility"; that in 1910 and 1924 the diagnosis had been "mania"; that he was removed from the mental hospital in 1934 while still insane and had never recovered and continued to have delusions, and that as a result he was incapable of making a will.

Apparently the case is that the diagnosis made on the 9th November 1934 viz: "imbecility" is a correct diagnosis and that being an imbecile in 1934 the testator could not recover from such a state and was not therefore capable of making a will.

The plaintiffs on the other hand contend that the four certifications were necessitated by the violent conduct of the testator and that there was no congenital mental defect in him, but that as a result of addiction to alcohol he lost self-control and developed mania, yet nevertheless between these attacks he was a person of sound mind capable of transacting his affairs. They further contend that since 1934 the drinking habits were abandoned and that from 1934 he was possessed of sound and disposing mind and memory. This expression is discussed and defined in *Banks* v. *Goodfellow*, 5 Q.B. at pp. 568 and 569 where following *Harwood* v. *Baker* (3 Moo. P.C. at p.291) it is stated that "in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom by his will he is excluding from all participation in that property".

Evidence referring to every stage of the testator's life has been brought before the Court. With reference to the case sheets relating to the four detentions of the testator in the Mental Hospital, there have been some objections raised to their admissibility by Mr. Koek during the hearing and I expressed my view that they were admissible subject to some qualification, but I have since considered the matter and it is quite clear these case sheets are admissible under section 32 (i) of the Evidence Ordinance and I shall deal with them on that basis in this judgment.

I do not propose to deal with fine distinctions as to when the onus of proof shifts from plaintiff to defendant and *vice-versa* in this case. I will state two propositions which are sufficient to guide me to a conclusion ".....English law is, and always has been, very strongly in favour of any will or codicil which in terms is not unreasonable and shows no sign of mental deficiency, and the law will not tolerate that it should be replaced or destroyed by any decision of the courts unless it is clear that the testator was incapable of making a will". Langton J. *Estate of Bohrmann* (1938), 1 A.E.R. 271 at 274. On the other hand, where a will is impeached, "the Court or jury must be able affirmatively, on a review of the whole evidence, to declare itself satisfied that the testator was of sound mind, memory, and understanding, at the time of its execution"...*Smith* v. *Tebbitt*, 1 P. & D. at p.436.

The testator Eusoff was born in February 1886. He was a son of E. M. S. Angulia who died in 1904. So that Eusoff, then about 18 years of age, became a comparatively wealthy person. He left school in 1902/3 having according to Ahmad M. S. Angullia reached the 5th form. In 1904/5 he received attention from Sir David Galloway then Dr. Galloway the family physician. Sir David states he was then suffering from melancholia. From the codicil to the will of E. M. S. Angullia it may be inferred that E. M. S. Angullia, his father, had some doubts as to the capacity of Eusoff to act as a trustee jointly with his brother Ahmad, and to look after his own share of the estate. But Ahmad states that Eusoff worked as a clerk in the office of the family business. In 1904/5 Eusoff married a lady from Rangoon and then lived at 240 Bencoolen Street, Singapore. He would then be about 18 years of age. According to Rahimaboo the household consisted of herself, Eusoff's mother, Eusoff and his wife. Rahimaboo declares Eusoff was not "all right" at time of the marriage. Ahmad on the other hand describes him as a person of loose and expensive habits, jovial, going about drinking. Dr. Galloway says that he suffered from melancholia about this time and also says that what would be described as melancholia then would be described as *dementia praecox* today. In 1910 he certified him as insane. Rahimaboo also speaks of violent conduct at about this period. There is no doubt that the testator had an attack in 1910 and was certified. The diagnosis was Acute Mania and the causes are said to be previous attacks and alcohol. He was then over 25 years of age. His brother Ahmad professes to know nothing about this certification. The original certificates of the doctors are not available. But the case sheet gives Ahmad as the friend of the patient. Ahmad however is compelled to admit knowledge of the 1918 certification because the form of application for admission to the asylum is produced and is signed by him and states that this is Eusoff's third attack and that he had his first attack at age of 25, (approximately 1910) and that the supposed cause was previous attacks. Ahmad would have me believe that on these two occasions Eusoff was being placed under restraint because of excessive drinking had brought on mania. On the other hand, it would be somewhat surprising to find that two Doctors viz: Drs. Galloway and Gibb who certify Eusoff both in 1910 and 1918 as insane were so easily deceived as to his condition and its cause. Dr. Gibb is responsible for the entries on the 1910 and 1918 case sheets, the present Superintendent of the Mental Hospital tells me; and it is somewhat surprising to find that at the age of 25, Eusoff is supposed by Dr. Gibb to be suffering from acute mania and on his second detention in 1918, at the age of 32 is diagnosed or classified as an imbecile. On this case

sheet the diagnosis is first written as "mania", that word is crossed out and "imbecile" is substituted. The entries in the 1924 case sheet, Dr. Home says, are by Dr. Gibb and Dr. Stone. The diagnosis of that date is stated to be "intermittent mania". The testator was then 38 years of age. The two doctors would presumably know of the previous diagnosis or classification. As imbecility is a congenital condition which, according to the medical opinion before me appears fixed and incurable, it is surprising to find that Dr. Stone who is satisfied to diagnose Eusoff as "imbecile" in 1934, when he was 48 years of age, and Dr. Gibb who diagnoses imbecility at 25 years of age (after alteration from 'mania') should both diagnose "intermittent mania" in 1924, when the patient was 32 years of age.

One of the impressions left upon my mind by Dr. Home's evidence is that these entries in a set form of case sheet as diagnosis are somewhat rough and ready classifications and are also based to some extent on the terms used in the English Mental Deficiency Act. But the age at which a diagnosis of imbecility is to be expected would be when the testator was 25, that is on his first detenion. The crossing out on the second case sheet, 1918, shows that there was a doubt about the matter. The reversion in 1924 to mania, appears to remove the doubt. But then in 1934 when the patient (the testator) is 48 years of age there is another diagnosis of "imbecile".

Dr. Home asserts that this diagnosis is a correct or proper diagnosis. In 1934 at or about the time of the admission of the testator to the asylum, Dr. Home was engaged in taking over the duties of Superintendent from Dr. Stone. The entries on the case sheet are made by Dr. Stone and Dr. Teck Keng Loon. At this time there were 1,000 to 1,200 inmates at the Mental Hospital. There was a Superintendent Dr. Stone, about to retire; Dr. Home his assistant, and two other medical officers. Dr. Home speaks from his memory and relies upon the recorded diagnosis "imbecile", which he says is Dr. Stone's diagnosis. Unfortunately Dr. Stone cannot be called and examined as a witness. Dr. Home has no notes of his own observations of the testator, which he frankly admits were limited to a few occasions, at the outside six. If it were possible to get into conversation with the testator, the observations would last ten minutes; if not one or two minutes. Whether Dr. Home formed a definite opinion at that time is open to question, because he admits now that the opinion he has given in Court, viz: that the testator is a case of mania superimposed upon a condition of imbecility was formed upon looking up the prior case sheets and seeing the information contained in them and that he had no other past history. It cannot be expected that an asylum Superintendent, admittedly an expert psychiatrist of great experience in charge of an institution with over a thousand inmates can remember the details of the condition of each and every patient and my conclusion is that his opinion is a deduction from an insufficient ground of fact. Dr. Home, also, was one of the certifying doctors in 1934; Dr. Melville Thompson the other. The grounds upon which they certify as expressed in their certificates, may, I think, fairly be stated to be symptoms of delusions and acts of violence to things and persons. Similar grounds are recorded in all the other case sheets, which copy out the material in the certificates. Consequently, apart from Dr. Home's very decided and strongly asserted opinion, the inference I would draw from such a history as the case sheets afford is that the patient (the testator) was always admitted at a time when he was in a state of great excitement resulting in violence and was also subject to delusions, and these delusions are not identical on each of the four admissions. Before I can accept even an expert opinion formed so late in the life of the testator that he was an imbecile, not only must the grounds of that opinion be closely examined, but all other evidence relating to the alleged imbecile's life must be taken into consideration. There is some mental derangement in the family, but it is probable that such occurs only in the descendants of Mariambee, the mother of the testator, Ahmad and Rahimaboo. The witness Vauda used the word "cracked" and declares Ajam Angullia a half-brother of M. S. E. Angullia (the testator's father) was mad in that sense. Ahmad on the other hand, says, that Ajam manifested signs of strangeness in manner following on the use of ganja. The testator and Rahimaboo's daughter, Khatija, both descendants of M. S. E. Angullia and Mariambee have been certified. One knows nothing of the family history of Haji Ebrahim Angullia the father of Khatija. All that is known about Khatiia in this respect is that she was one month in the mental hospital from 13th December 1922, when she was 25 years of age, and that the symptoms observed are somewhat similar to those observed in the testator on his admissions viz: delusions, fits of violence and insomnia.

Mr. Miles who made the will and knew the testator for over 30 years says that he had a sound elementary education and could read and write the English language. Ahmad says that the testator left the Anglo Chinese School when he was in the 5th or 6th form. Rahimaboo says he was only in the 3rd form. Even if she is right, it seems a little difficult to classify a person as an imbecile from youth onwards who can learn to read and write, what is to him a foreign language, so as to give the impression of having a a sound elementary education, who can according to Mr. Soraji converse also in an Indian tongue

and also according to other evidence in Malay. Ahmad also speaks of him doing the work of a clerk and having English speaking friends in his earlier years. Of late years too the testator could find some relaxation in visits to the cinema.

Among the witnesses called on behalf of the case for the defendant, Baroocha, Haji Ebrahim, and Rahimaboo all attempt to show that throughout his life the testator was an imbecile, who also had delusions and was also subject to fits of violence. Baroocha is mixed up in Rahimaboo's divorce. It is, I think, a fair inference to say that he is the person concerned in what even Rahimaboo admits, was a family scandal. Rahimaboo has not been on good terms with Ahmad throughout her adult life. Haji Ebrahim is Rahimaboo's husband, and possessing a Power of Attorney from her, charged her interest in her father's estate many years ago to a money-lender, with the result that Ahmad bought out the money-lender and has since given Rahimaboo an allowance. There has been ill feeling between brother and sister ever since. Vauda, another witness, who speaks as to the past and recent history of the testator is the husband of Khatija, the daughter of Rahimabee, who was certified in 1922. Then, there is Rahimabee who was the wife of the testator, and who has an interest in avoiding the divorce. To a marked degree these witnesses are biassed, but I am not rejecting their testimony on that account, but propose to examine it. A greater part of their evidence purports to relate to incidents in that period of the testator's life ending in 1934, and there is in respect of this period an inability or hesitancy to fix the time and place, so that I am left with an impression of vague general assertions which, with the exception of Rahimabee's evidence, does not materially add to the evidence disclosed by the certifications.

Rahimaboo, it appears, lived at 240 Bencoolen Street up to 1910. In that year her husband Haji Ebrahim states he left Bencoolen Street and lived at other places and only saw the testator two or three or sometimes 4 or 5 times a year down to 1927. While this lady gives no details of her association with the testator, I think, it must be inferred that she had no greater opportunities than her husband. She declared that she saw signs of insanity in childhood. The signs were that he broke up things. She never observed any signs of drinking. She had been told by Ahmad of an attempt by Eusoff to throw himself into the sea. She describes an illusion about seeing a "head", the acts of bringing rubbish into the house, disturbing pictures and furniture. She avers that the testator was dull and foolish and did not know how to speak, that the delusion about the head without legs and another about tigers and elephants put her late brother in continual fear. Yet at times she says he had his own motor car and many times changed his car and bought others. And though she never observed drinking the testator used to come home in a taxi or ricksha and refused to pay the fares. She was present at both his marriages but does not think it was incumbent upon her to object in any way to the marriages upon the ground that he was insane. Such incidents as this witness describes and such opinions as she expresses do not support the view that her brother had always been an imbecile.

Rahimaboo's husband, Haji Ebrahim is 67 years of age and would be a boy of 14 or 15 when Eusoff was born. Haji Ebrahim was then living at 240 Bencoolen Street. He doesn't quite remember about Eusoff's schooling but it was irregular. He went to Rangoon for Eusoff's first marriage. After that he lived on the opposite side of Bencoolen Street. But when his evidence is examined he appears to say nothing of any effect until the divorce incident in 1938.

Baroocha is the son-in-law of Haji Ebrahim and Rahimaboo and his observations commence from 1910, which is the year the testator was first certified. Baroocha would then be about 17 years of age; and what he says as to delusions at that time is consistent with the 1910 certification. In the next period 1910-1917 Baroocha says that the testator visited him once or twice a week. The witness was then living at Cuff Road with Rahimaboo and her husband and he had never seen the testator under the influence of drink but the testator complained of seeing things, of being afraid. He saw him 3 days after he came out of hospital in 1918. He was then violent and spoke obscenely. Baroocha also says he visited the testator in the mental hospital in 1924, and continued to see him once a week until he married in 1927. His impression of the seven years 1927-1934 he expresses in these words:— "Sometimes he was all right but stupid. He was not calm and made no disturbance or walked about. When he was not violently mad he had the delusions and he told me about them. He said he saw the head without legs, tigers, elephants and other animals". Two days after Eusoff came out in 1924 he saw him escorted by 2 Bengalis and spoke to him and received an irrational reply. From that time onwards until March 1938 he saw the testator "about once or twice a week." In cross-examination he is somewhat uncertain whether the incident of the two Bengalis is in 1918 or 1924, but the testator was in the New World at the time and it was 10 p.m. Further in cross-examination he states "His madness was one of quietness obvious to all who mixes up with him" and that he himself would not know had he not "mixed up with him." This latter statement may be contrasted with Dr. Home's statement in his cross-examination when on referring to Eusoff he said "He was a well

marked case of imbecility, not necessarily obvious to the ordinary, reasonable man, but the symptoms of imbecility would be clear to a doctor who knew anying about the subject." And finally Baroocha declared that in the whole of his 28 years of association with the testator he had no rational conversation with him at all. I find that statement difficult to believe, if the symptoms of imbecility are not necessarily obvious to the ordinary man. Perhaps Baroocha is not ordinary, and certainly something must be allowed for his bias. Even if nothing is allowed for it the result of all his evidence is an account of various delusions affecting the mind of the testator over a long period.

Vauda, is a man of 62 years of age and has been acting as an agent for Rahimaboo. He is the petition writer type of person, as his English in the petitions he has written shows. It is he who alleges that certain members of the family of his wife Khatija are "cracked" and that in 1903 Eusoff had some slight trace of this madness. He did not see much of the family at that time but formed the impression that Eusoff was not quite normal. He then was in touch with the family again in 1916. In 1917 or 1918, he can't say which year, he states that Eusoff was brought from Kuala Lumpur by two constables. No question as to this was put to Ahmad. The incident he describes may relate to the 1918 certification because the case sheet on that occasion states that the patient was admitted with handcuffs on. When he married Khatija in 1919 he says he was not on visiting terms with the family and did not see Eusoff again till some occasion in 1926. But he was present at his wedding in 1927. He considers that even at that time Eusoff "was not normal". The next occasion is in 1936 and then Eusoff told him "the goat" or "satan" used to appear and frightened him. "He was calm, his lips moved and he spoke to himself." Next time is in August 1937 at No. 1 Wilkie Road the house of Rahimaboo and of this occasion he says: "His state of mind was not good. I spoke to him of many things but he did not understand one of them".

So much for his evidence down to that date, the remainder of it will be referred to later when I come to deal with the petitions and the divorce. Though I must say that I have doubts as to the evidence of a person, like Vauda who, having as he says ascertained that Eusoff does not understand anything, nevertheless prepares a petition a few months later in which Eusoff purports to make serious allegations against his brother Ahmad.

The evidence of Rahimabee, the testator's wife, covers a period from her marriage in 1927 to March 1938, a few months prior to the testator's death. Ahmad Angullia says that this marriage was arranged by his sister Rahimaboo, Rahimaboo denies this. But Ahmad and Rahimaboo are the elder brother and sister of Eusoff and they both knew his history. Before the marriage he had been 3 times in the asylum. He was then 41 years of age. Rahimabee was then 16. Her father is M. E. Angullia an uncle (half blood) of Ahmad and Rahimaboo. Rahimabee's mother is Ayesha and there is some suggestion she arranged the marriage. It was an open and a public affair as far as the family, especially those members of it who have given evidence, was concerned.

What then must the condition of Eusoff have been in 1927, with such history as disclosed including his three detentions as a person of unsound mind. There is one fact that Rahimabee admits which has some bearing on the matter that is that from 1927 to 1930 Eusoff did not indulge in alcohol. I cannot suppose that the near relatives of Eusoff, who are not in poor circumstances, just found him a wife to look after him, or that the wife's parents or Ahmad, or Rahimaboo would permit the marriage to their young and near relative if they did not at that time believe that Eusoff was mentally fit to undertake the responsibility of marriage. Three years had elapsed since the 1924 detention in the asylum and Eusoff may well have given the impression to those nearest to him that he was, to put the matter at its lowest, relatively normal. On the other hand, Rahimabee now states that she had known her husband since she was 7 or 8 years old and knew before marriage that he was not right in his head; that he used to come to her mother's house and create a disturbance. Apart from this an examination of her evidence leads me to the belief that she is recounting some of the later occurrences of her married life first and thus tending to create an impression in the minds of her audience that her 11 years of marriage has been all of a piece and a very hard life for her throughout. But her general appearance does not seem to bear that out. The most she can really say of the first three years is that it is a time when her husband was in fear and did not go out and as I have already observed at that time she says he did not drink. But then his "madness" reached its height on three occasions culminating in the certification of 1934. Throughout the whole 11 years he had delusions and when he became mad he went to the shops to drink, when these paroxysms came upon him he would injure himself, behaved in a disgustingly dirty manner, suffered from insomnia, broke crockery, brought rubbish into the house from the streets and told his wife that the reason for this behaviour was that the world was coming to an end, that he was driven to it by the "goat". Even in his quieter moments he was dirty in his personal behaviour and towards the end he was something like a baby whom she was nursing. Apart from the question

of his age the conduct which has been described appears consistent with that of an imbecile. Dr. Home was shown certain passages (pp.35 & 36 of my notes) of her evidence and on the assumption that it is true says that it tends to confirm him in his opinion as to imbecility. And yet to all appearences, at least, there has just been a lucid interval of some years in which it was possible to contract a marriage, which tends to show that the opinion as to imbecility is a theoretical opinion. There appears to be an attempt to fit the facts into the theory. On the other hand, the wife admits there was an early period of no drinking and later drinking occurred when the attacks are at their height and no drinking after 1934. Clearly there is evidence of delusion and Rahimabee appears in one of her assertions to summarize a good deal of what the other witnesses say about the delusions when she says—"The goat directed him was his explanation and the goat was in the form of a skull". Other witnesses speak of "the goat" and "the head without teeth". Allowing for the varying interpretations, one of the principal delusions appears to be this appearance of Satan. None of the delusions described by the witnesses are ever related to the certifying doctors and these doctors have not noted any delusions similar to those described by the lay witnesses.

Other evidence about the testator's life between the years 1910—1934 is not very detailed. After leaving the office of the firm of Angullia he had a business of his own for a few months but gave it up in 1913. From 1913 to 1915 there is the winding-up of the M. S. E. Angullia estate. As there were trustees for his share he could not take a serious part in that. But he did enter into two agreements relating thereto by which a partition of the properties was effected. These matters came before the Court in O.S. 101/1914. The testator was separately represented by Messrs. Sisson & Delay, and he executed the necessay agreements and assignment within the period 2nd December 1913 and 24th May 1915. All these documents appear to be regularly executed and it would be difficult to believe that the solicitors concerned would have allowed him to execute them if he had the appearance of being an imbecile. In 1917 he gave a Power of Attorney to his brother Ahmad, who thereafter managed Eusoff's real property and built certain houses, advancing the money therefor and in 1932 to cover this expenditure the testator executed a mortgage in favour of Ahmad to cover these advances and the charges Ahmad was entitled to make. In this matter also the testator was separately represented and advised by solicitors. In 1918 he sold the house 240 Bencoolen Street to Ahmad's wife who afterwards conveyed it on trust to her husband and later the trust was revoked under the power given in the deed. In 1935 the testator renounced his rights to administration of his mother's estate.

Apart from this, there is no evidence of any active occupation from 1915 to his death 23 years later. He appears to have no friends during these years except Mr. Ali Khan Soraji. In 1934 he was discharged from the asylum and it does not appear that he was cured but that he had become quiet or calm again. At that time Dr. Melville Thompson was attending him and had been attending him or his wife since 1928. The doctor is unable to produce a complete record. Certainly he certified Eusoff with Dr. Home in 1934. At this time Eusoff had developed diabetes and there is intermittent treatment down to 1938 when he handed the case over to Dr. Laidlaw Thompson. As to 1934 he says after a month's detention Eusoff appeared all right: "for the last few years of his life he was obviously normal". He agrees that Eusoff as a personality was a dull and stupid person, but mentally alert for his class. He saw Eusoff for half an hour on April 24th, 1938 and he appeared quite normal and on the 6th June he observed no change. According therefore to this doctor, Eusoff was, from 1934 onwards a dull and a stupid person mentally alert for his class and this doctor has no knowledge of delusions or any other signs of unsoundness of mind other than what he observed when he certified Eusoff in 1934.

According to Rahimabee, when Eusoff came out in 1934, Ahmad engaged two Bengalis to look after him for a month. He developed diabetes about this time. It was in a mild form says Dr. Melville Thompson and could be kept down by proper diet. The doctor saw practically nothing of him in 1935 but in 1936 he was called in to Pulu Road (Pool Road) Katong when he had boils due to improper diet for a person in a diabetic condition. This probably the occasion when Vauda saw him though he says it was 1937, for he also refers to boils. Dr. Melville Thompson has no record for 1937, but may have attended. His next record is 24th April 1938 when he handed the patient over to Dr. Laidlaw Thompson. Dr. Melville Thompson is not a psychiatrist, he is a general practitioner with the usual necessarily limited experience of lunacy and I should hesitate to accept his opinion as to the testator being obviously normal during his latter years.

Certainly there is a gap from 1934 to August 1937 which is only partially filled by the evidence of Rahimabee. Part of the time she and her husband were living at Katong partially in Bencoolen Street and finally a month at Geylang. Rahimabee asserts that the principal delusion "the goat" was still being complained of, but that Eusoff did not drink, that he was dull and stupid but was quiet; there were no violent symptoms. Apparently they were living in Bencoolen Street in 1936 and 1937. In 1936 Dr. Galloway says he met Eusoff in the street alone, and had a conversation (one of several between 1918 and 1936) on irrelevant matters. It is difficult to know what would be relevant to a social meeting. But it is interesting to note that Eusoff greeted his old doctor effusively was therefore able to recognize him. At this time too Mr. Ezekiel relates meeting

Eusoff in the street and while speaking to him Eusoff tore his singlet to bits. A few months later he saw him behaving foolishly at a shop and taking an empty flour sack home and shaking the remains of the flour on the steps of the house. Again about the same time he observed Eusoff urinating in the street. This gentleman's relations have had some landlord and tenant's dispute with the plaintiff and he is an acquaintance of Vauda. He has never seen Eusoff drunk though Mr. Ali Khan Soraji says Eusoff was drunk on one occasion six months before his death. No other witness has observed anything of that kind since 1934. Mr. Ezekiel's evidence is consistent with Eusoff being insane or drunk and it is not of any help.

In August or September 1937 Vauda begins to take a part in the family affairs. Rahimaboo at the same time instructs her solicitors to write to the trustees of the M. S. E. Angullia estate alleging that her brother is mentally deranged and incapable of managing his own affairs. Identical letters were then sent by Campbell & Co. to A. M. S. Angullia (plaintiff No. 1) and to M. E. Angullia on 16th September. On the same date Rodyk & Davidson wrote that they had been consulted by Eusoff, Ahmad and M. E. Angullia and after further letters Rodyk & Davidson write on the 20th September saying "We are instructed E. M. S. Angullia (Eusoff) is neither mentally deranged nor is he incapable of managing his affairs." Ahmad says he did not regard correspondence from Rahimaboo seriously, he had had so many nasty letters from her. And in reference to her allegation of Eusoff's mental derangement says, "I denied it." Apparently he is the person primarily responsible for the instructions to Messrs. Rodyk & Davidson to the effect that Eusoff is not mentally deranged. But at this time, September 1937, both Eusoff, Ahmad and M. E. Angullia must have attended Rodyk & Davidson's office. It is at this time that we have Vauda saying of Eusoff "His state of mind was not good" and Rahimaboo describing him as a helpless person who could not dress himself. Ahmad bin Abu Bakar, who was the cook from March to December 1937 says that Eusoff used to tell him about his delusions. Rahimabee on the other hand does not come down to details covering this period and admits that throughout the period Ahmad bin Abu Bakar was cook, her husband was quiet. They allege at that time mental derangement. This September 1937 correspondence resulted from a meeting at Rahimaboo's house 1, Wilkie Road at which Eusoff and Rahimabee and Rahimaboo were present. Rahimabee was complaining that she was short of money. Rahimaboo seems inclined to place the responsibility for the letters, then written by Vauda ostensibly for her, upon Rahimabee. Rahimaboo was at that time in litigation with Ahmad (though Vauda professes to have taken no part in it). I cannot help but have some doubt as to the bonafides of Vauda, Rahimaboo and Rahimabee with regard to this correspondence. It is difficult to say how far they intend the allegation of mental derangement to be taken seriously, and the allegation is all a part of an attack about to be launched by way of an application to sue *in forma pauperis*, which does not appear to have been granted.

The next event is the divorce of Rahimabee on 21st January 1938. Rahimabee is obviously under a grievance about this. Although her husband had according to her given her a very hard life she says she did not want to be free of him. She is in no fear of destitution, married or divorced. She attempts to show that this divorce was forced upon Eusoff by Ahmad. The cause of it was her application to Ahmad for some money to obtain a native medicine man to treat her husband. It must be admitted that such an allegation does give an unfavourable colour to her evidence, because it is plain that both she and her husband have been patients of Dr. Melville Thompson. It is a ridiculous reason and does not ring true in the circumstances. It may be true that Eusoff did not want to divorce her. There was a regular family meeting Ahmad and the wife's father were there. Ahmad suggested 3 talaaks. But she had already told Eusoff to keep silent whatever Ahmad said to him. She denies that it was on the advice of the Imam that two talaaks were given. But Eusoff though pressed appears capable of exercising judgment in the matter and did not make an irrevocable divorce on this occasion. Five days later Rahimabee sent her brother Dolah to her husband with a request for reconciliation. She described a touching scene with mutual weeping, and the divorce was revoked on 5th February This first plain admission by this woman that her husband was a human being, capable of affection, is somewhat remarkable. Even though Dr. Home tells me that imbeciles laugh and cry on little cause the breaking of a marriage is not a little cause. But she says also he was not right in his head at this time. And we have the evidence of Haji Ebrahim that he simply took Eusooff to the Imam and that Eusoff took no part in the revocation proceedings at all. He simply signed after it was all over. I noted at the time my impression of this witness, it was distinctly unfavourable to him and it remains so. From this time onwards Rahimabee avers Ahmad was coming almost daily to the house at Bencoolen Street and urging Eusoff to divorce her with 3 talaaks saying this wife will cause you trouble and bring you into the Courts. She then moved to Geylang until Kassim came and said the allowance and the motor car would be restored if they went to live at Angullia Park. If what she says is true then Eusoff was at this time exercising certain powers of will—probably the obstinacy of a dull and

stupid man who was attached to his wife—against the suggestion of Ahmad.

Rahimabee is a difficult witness to value. I cannot reject her testimony entirely. She appears intelligent but biassed. She certainly has a material interest in maintaining her marriage with a husband 30 years older than herself, who she knows is ill with diabetes, who has sunk into a quiescent condition, whose diet has to be strictly watched and who will certainly not live long. On the other hand Eusoff has clearly a desire to keep her as his wife. He appears at least to realize that she can look after his material comfort and he certainly refuses at this stage to believe the attacks made upon her. On the 7th February, according to Rahimabee, Eusoff signed a petition to the Chief Justice which had been prepared by Vauda. It is clearly signed in latin character "E. M. S. Angullia." The signatory admits he was unable to be a trustee of his father's will by reason of "his mental defection." He alleges there was no proper distribution of the estate of his father, that he has only a small allowance, insufficient as he is unhealthy, that he has complained to Rahimaboo and requested her to investigate his affairs and to apply to the Court on his behalf; that he is under the control of his brother and has executed documents without knowing their purpose and did not receive "any consideration thereof except the usual maintenance as specified." Therefore he prays the Chief Justice to accept the application of his sister on his behalf. The only petition by the sister Rahimaboo I have seen is one dated the *31st May, 1938*. It seems clear that Vauda wrote both these petitions. His investigations in the Registry of Deeds was not completed until April 1938, hence the delay in writing Rahimaboo's petition. He had got some general instructions in August September 1937, but his efforts after the letter of 24th September seem to be more on his own account or on behalf of Rahimaboo. Vauda wants me to believe that Eusoff signed his own and his wife's petition of 7th February 1938 without knowing the contents. These petitions are dated two days after the revocation of the first divorce. At that time, I think it right to infer, that Eusoff was at the time somewhat annoyed with his brother Ahmad, who had pressed the divorce upon him; also with M. S. E. Angullia his wife's father who had also been present at the divorce. He was at that time on good terms again with his wife, and to some extent under her influence. But this is not the first time that Eusoff has given expression to the idea that he has not had his full share of his father's estate. An expression of it is found in one of the case sheets. Having regard to his history both on the mental side and to his agreements about the division of the estate in 1913 to 1915 and his complete dependence on his brother Ahmad in respect of property matters since that date, I do not think that he signed his own petition and his wife's petition simply because he was requested to. Vauda goes too far.

The result of his so signing and of his wife's accompanying letter to Ahmad was a letter from Rodyk & Davidson withdrawing all authority from Vauda and Rahimaboo, a letter written ostensibly on Eusoff's instructions, and a few days after that, although Rahimabee is setting up the mental derangement of her husband, she goes quite voluntarily with him to live at Angullia Park. This brings the story down to early in March 1938. Later that month and before the second divorce Rahimaboo describes an incident when Eusoff and Rahimabee came to her house "His wife wanted him to stay and drink tea he refused and wanted to leave the house at once. He said get a car at once if a car cannot be obtained he will go on foot." This incident is put forward by her as an indication of his insanity. At this time Eusoff was a sick man but was not bedridden.

On the night of the 26th March Baroocha speaks of having a long conversation with him. He denies that he was in the house in the company of Rahimabee, while Eusoff was asleep; but the conversation on closer examination appears to be a series of silences. It is hardly credible that he wants to spend three hours "talking" to a person who in the past 28 years he has found incapable of intelligent conversation. On the following night according to Rahimabee Eusoff was awakened and conducted to Ahmad's house in Orchard Road where the second divorce took place. She suggests that her husband was in a drugged sleep resulting from an injection given him that day by Dr. Melville Thompson. She is, however, cross-examined into admitting that at that time Dr. Thompson was attending her and not Eusoff. She professes to know nothing of the cause of this divorce, but that same night Baroocha has to admit that he found Rahimabee at his house when he returned home. Certainly she never saw her husband again alive. This divorce was in the presence of her father.

Matters of this kind are talked over to quite a lengthy extent and there is no understanding her absenting herself that night from her sick and to her insane husband except upon the assumption that she knew quite well what was going to take place. After that Eusoff removed into his brother's house and Abu bin Baker his former cook was engaged as his personal attendant. He was out at times, and during these last few months of his life he is seen by Ahmad, Ali Khan Soraji, Dr. Laidlaw Thompson, Pereira and the attendant. Then finally on the 3rd June he gives the instructions for his will.

Such conversations as Mr. Soraji had with him at this time seem to relate mostly to statements by Eusoff of his medical treatment. His doctor would be regarding him as a case of dia-

betes and would be engaged in observing reactions to treatment. His attendant tells us of his delusions. I see no reason to reject him entirely but he is obviously exaggerating everything. Pereira tells of Eusoff's worrying over separating from his wife. But he is able to go out in the car with Pereira and members of Ahmad's household. Such evidence seems to add little to what has already been learnt of Eusoff's mental condition.

Certainly the will on the face of it seems rational enough and Mr. Miles the solicitor who took the instructions appears to be under the impression that Eusoff was sufficiently sound to make a will. I need not go over his evidence. He was cross-examined on every detail and though there are suggestions incorporated in the will which emanate from him, they are nothing other than what a solicitor may properly suggest to a lay client. The effect his evidence leaves upon my mind is that Eusoff was determined to leave everything he had to found a Wakf and wished his brother to have the opportunity to purchase his half share in the house at Radir. There was quite a lengthy discussion between Mr. Miles and Eusoff that day and Mr. Miles could fairly form an opinion that Eusoff quite understood what he was doing. There is nothing indicative of that state of imbecility which the defendant tries to set up in this case from Mr. Miles' evidence. Mr. Miles must to some extent have been on guard to observe Eusoff's mental condition because only in the previous September had his firm dealt with the allegation of mental derangement made by Rahimaboo. This was not his first meeting with Eusoff, he had met him off and on over a period of years. At the same time the more intimate details of Eusoff's life were unknown to him and he knows nothing of and is surprised to learn about the four certifications. Nevertheless his evidence must be treated seriously. It is independent and unbiassed by any interest.

Dr. Laidlaw Thompson was a witness to the will on the following day. Although he is young in professional experience he gives his evidence in a clear and careful manner, and knows that as a medical attendant on the testator he should not witness his will unless satisfied of his competency. It is suggested he made no tests, but his evidence leads me to believe that he had in the period 24th April 1938 to June 4th 1938 been sufficiently observant to come to the conclusion that the testator had a mind of his own. Certainly it is a dull mind, that of a stupid and backward man, who needs to be told everything twice in order to get him to understand. He again did not know anything much of his patient's past history. He is present when the codicil giving a discretionary income to Rahimaboo was written by Mr. Miles and hears the matter discussed. In such circumstances he is capable of observing whether Eusoff understood what he was doing, even though he is making the codicil at Mr. Miles' suggestion. It has been submitted that a letter written by Rahimaboo and posted on the 4th June at Queen Street Post Office at 10.45 a.m. had already been received and was the cause of this codicil. It is one of Vauda's compositions. There is no evidence that a letter so posted could be received in so short a time and even if it were so received, it does not account for Mr. Miles suggesting that Rahimaboo should be considered on the previous day.

What then was the condition of Eusoff at the time he made this will? A will rational on the face of it, and made in an apparently rational manner. I have from the defendant's witnesses a number of general assertions as to delusions and violence. Generally these witnesses deny all knowledge of addiction to or the intermittent use of alcohol. I have a medical history on the case sheets and several conflicting opinions from lay and medical witness. I find myself unable to accept the conclusion that Eusoff was and always had been an imbecile. His early years, education, his appearances before a number of lawyers up to 1915 and even on the mortgage in 1932 and his long periods without any violent outbreak and finally the will itself do not support that conclusion.

Clearly there has been insanity in the past, and the classification of the disease affecting his mind is difficult. But he appears to me to have had numerous lucid intervals in the past years and I have no hesitation in saying that this will has been made in a lucid interval, during which, in my opinion, the testator clearly understood the extent of his property and the nature of the claims of others whom, to some extent, he was excluding from participation.

I therefore find for the will.

Will & Codicil pronounced for.

The question of costs was then argued.

Horne, J., made the following order:—

The plaintiff to have their costs of the suit taxed as between solicitor and client out of the estate subject to such set off as may arise by any payment to them of costs ordered to be paid to them.

That the costs of the defendant on the insanity issue as between party and party be taxed and paid out of the estate.

That the costs of the plaintiff as between party and party on the undue influence issue be taxed and be paid to them by the defendants.

Solicitors for the Plaintiffs—

Rodyk & Davidson.

Solicitors for the 1st Defendant—

John G. Campbell & Co.

Solicitors for the 2nd Defendant—

Johannes & Sammy.

END OF STRAITS SETTLEMENTS OFFICIAL REPORTS.

F. M. S. REPORTS

[APPELLATE CRIMINAL JURISDICTION]
AITKEN, J.
December 21, 1937.

PUBLIC PROSECUTOR.....Appellant.

v.

SURJAN SINGH.....Respondent.

[PERAK MAGISTRATE'S CRIMINAL APPEAL No. 68 of 1937]

PUBLIC PROSECUTOR.....Appellant.

v.

CHANCHEL SINGH.....Respondent.

[PERAK MAGISTRATE'S CRIMINAL APPEAL No. 69 of 1937]

PUBLIC PROSECUTOR.....Appellant.

v.

NARANJAN SINGH.....Respondent.

[PERAK MAGISTRATE'S CRIMINAL APPEAL No. 67 of 1937]

Autrefois acquit — Section 302, Criminal Procedure Code (Cap. 6)—Test of applicability.

The respondents were tried by the Magistrate for offences under section 414 of the Penal Code. They were acquitted. They were then charged under section 35 (i) of the Minor Offences Enactment (Cap. 46).

The Magistrate held that because both the previous charge under section 414 of the Penal Code (Cap. 45) and the subsequent charge under section 35 (i) of the Minor Offences Enactment were based on the same set of facts the plea of *autrefois acquit* was available to the respondents.

Held, reversing the Magistrate, that the true test is whether the acquittal on the first charge necessarily involves an acquittal on the second charge. In this case the ingredients of the two offences differ considerably and evidence to establish the commission of the one would not necessarily establish the other.

I. W. Blelloch, Deputy Public Prosecutor, for the appellant.

K. M. Coomarasamy for the respondents.

AITKEN, J.—In my opinion the learned Magistrate was wrong in accepting a plea of *autrefois acquit* in these three cases, and they must be remitted to him, with a direction that the plea of *autrefois acquit* should have been rejected and that, subject to any other defence which may be available to them, the charges against these three defendants must be heard and determined on the evidence adduced.

It would seem that the learned Magistrate held that because both the previous charge under section 414 of the Penal Code, and the present charge under section 35 (i) of the Minor Offences Enactment, are based on the same set of facts, therefore the plea of *autrefois acquit* is available to the defendants. But that is by no means the true test. The test is, rather, whether an acquittal on the first charge necessarily involves an acquittal on the second charge; and that is obviously not the case here as the ingredients of these two offences differ considerably from one another, and evidence which would establish the commission of one of them would not necessarily establish the other.

The relevant provisions of our local law are to be found in section 302 (i) of the Criminal Procedure Code which reads as follows:—

> "A person who has been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 166 or for which he might have been convicted under section 167".

On these provisions two questions arise. Firstly, could a charge under section 414 of the Penal Code have been joined with a charge under section 35 (i) of the Minor Offences Enactment pursuant to the provisions of section 166 of the Criminal Procedure Code? The answer to that question is, in my opinion, in the negative; because evidence which is admissible to prove an offence against section 35 (i) of the Minor Offences Enactment, is not admissible to prove an offence against section 414 of the Penal Code. In this connection see the judgment in *Tan Hoe Seng* v. *The Public Prosecutor* (1936) F.M.S.L.R. 135, 137, 138; 5 M.L.J. 272.

The second question is this: could the defendants have been convicted of an offence against section 35 (i) of the Minor Offences Enactment on a charge of an offence against section 414 of the Penal Code pursuant to the provisions of section 167 of the Criminal Procedure Code? Here again it seems to me that the answer must be in the negative, because this section 167 has to be read with section 166, and only applies to a case where section 166 applies. As I have already expressed my opinion that section 166 does not apply so as to enable a charge under section 414 of the Penal Code to be joined with a charge under section 35 (i) of the Minor Offences Enactment, then it follows assuming that my opinion is correct—that a defendant charged with an offence againt the first of these sections cannot be convicted on that charge of an offence against the second of them.

To summarize the foregoing, it seems to me

(1) that the defendants have not been previously acquitted of the same offence;
(2) that they have not been previously acquitted of an offence which is substantially the same as the one with which they are now charged; and
(3) that they could not have been convicted of the offence with which they are now charged at the conclusion of the previous trial.

For these reasons the learned Magistrate, in my opinion, went wrong when he allowed the plea of *autrefois acquit*; and the judgments of acquittal which he then pronounced must be set aside and these cases go back to him for trial.

Order of acquittal reversed.
Further enquiry directed.